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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 237

LIBERALE PARRINO, PETITIONER

v.

UNITED STATES OF AMERICA

ON MOTION TO PROCEED ON TYPEWRITTEN PAPERS AND ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

The majority (Pet. 8-13; R. III, 54-59) and dissenting opinions (Pet. 13-22; R. III, 59-68) in the Court of Appeals, on the appeal (Pet. 8-22; R. III, 54-68)[1] and on petition for rehearing (Pet.

[1] There are three records filed in this case. The gray printed record of the original trial will be referred to as R. I, the typewritten transcript on the Section 2255 proceedings as R. II, and the typewritten transcript on the proceedings relating to the motion to withdraw petitioner's plea of guilty, which give rise the issue now before this Court, as R. III.

23-24; R. III, 82-83), are reported at 212 F. 2d 919. The memorandum opinion of the District Court (R. III, 4-10) is not reported.

Prior opinions in this cause are reported at 180 F. 2d 613 (Pet. 25-32; R. I, 160-167) and 203 F. 2d 284 (Pet. 33-40; R. II, 58-65).

JURISDICTION

The judgment of the Court of Appeals was entered April 26, 1954 (R. III, 69). A petition for rehearing (R. III, 72-81) was denied May 25, 1954 (R. III, 84). On June 18, 1954, by order of Mr. Justice Jackson, the time for filing a petition for certiorari was extended to July 24, 1954, and the petition was filed on the latter date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

Petitioner moved to withdraw a plea of guilty after a two-year sentence on the plea had been imposed and almost completely served. The question presented is whether there is error in the district court's holding, affirmed by the court of appeals, that petitioner should not be permitted to withdraw his plea since he had failed to show, as required by Rule 32(d) of the Federal Rules of Criminal Procedure, that such withdrawal was necessary in order "to correct manifest injustice."

RULE INVOLVED

Rule 32(d), F. R. Crim. P. provides:

> WITHDRAWAL OF PLEA OF GUILTY. A motion to withdraw a plea of guilty or of *nolo contendere* may be made only before sentence is imposed or imposition of sentence is suspended; but to correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

STATEMENT

Petitioner had been indicted in September 1934, for conspiracy to kidnap, but had fled from justice and remained a fugitive under an assumed name until 1940. In 1937, a *nolle prosequi* was entered as to him because he could not be found. (R. I, 161.)

In 1948, an indictment in two counts, based on the 1934 kidnapping, was returned against him, the first count charging the substantive offense and the second conspiracy to kidnap (R. I, 4-11). The conspiracy count alleged, *inter alia,* that it was part of the conspiracy that the conspirators would beat and torture the victim until he divulged information concerning a package of narcotics and paid over certain moneys (R. I, 5-6). At the trial petitioner was found guilty and sentenced to imprisonment for twenty-five years (R. I, 145, 150). The judge had instructed the jury that, if they found that the kidnapped person had not been liberated

unharmed, they were to declare whether they recommended the death penalty (R. I, 144). The jury did not so recommend (R. I, 145). On appeal, the Court of Appeals, on March 7, 1950, reversed the conviction, holding that the statute of limitations barred the prosecution unless the death penalty was applicable and that it could not tell whether the death penalty was in fact applicable since the jury had made no finding as to whether the victim had been released harmed or unharmed (R. I, 160-168). The Court of Appeals noted, 180 F. 2d at 615:

> Since all we know about [the victim's] condition at the time of his release, is that a jury *might* have found him "harmed", we cannot tell whether the jury did not recommend the death penalty, because they decided that the victim had been released "unharmed", or because, although they found that he had been released "harmed", they used their discretion in his favor.

In view of the reversal, deportation proceedings, which had been instituted against petitioner on the basis of his conviction, were discontinued (R. III, 8, 59).

When the case came up for retrial in October 1951, petitioner, who was represented by counsel of his choice, pleaded guilty to the second count, charging conspiracy to kidnap (R. II, 3). The first count was withdrawn by the government, and peti-

tioner was sentenced to imprisonment for two years (R. II, 22, 25, 26).

At the time petitioner entered his plea, the following colloquy occurred (R. II, 2-4):

> The Court: Have you had an opportunity to talk to your counsel?
>
> Counsel, have you discussed the matter with him?
>
> Mr. Anfusco [petitioner's counsel]: I have, your Honor.
>
> * * * * *
>
> The Court: Do you understand what you are doing?
>
> [Petitioner]: Yes, I do.
>
> * * * * *
>
> The Court: Do you understand the charge against you?
>
> [Petitioner]: Yes.
>
> The Clerk: Do you withdraw your plea of not guilty and plead guilty to that second count?
>
> [Petitioner]: On one condition.
>
> (Discussion between counsel and [petitioner], off the record.)[2]

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[2] The affidavit filed in this proceeding by the attorney who represented petitioner at the time (R. III, 30-32) contains no clarification as to the subject matter of the off-the-record discussion. The affidavit does indicate, however, that petitioner's counsel had discussed with the attorney for the government the matter of the dismissal of the first count of the indictment (R. III, 30).

The Court: What is the condition?

[Petitioner]: Okay.

The Clerk: He pleads guilty to the second count.

[Petitioner]: Yes.

The Court: Without any condition?

Mr. Anfusco: That is right?

[Petitioner]: Yes.

The Court: What did he have in mind, counsel?

Mr. Anfusco: The matters we were talking about with the United States Attorney which has nothing to do with the plea at this moment.

Mr. Martin [U. S. Attorney]: It is an old case.

When petitioner came up for sentencing on December 13, 1951, both his counsel and the government attorney made lengthy statements with respect to the sentence which should be imposed (R. II, 6-26). In the course of his statement the United States Attorney mentioned the fact that petitioner had been present when the kidnap victim was tied with ropes, suspended from a doorknob, and burned with lighted cigarettes (R. II, 9). He also said that petitioner had acted as a "bodyguard to the victims" (R. II, 16). At one point, the Court said:

> Here is a man who got hold of a man and took him to the places, and he was present while punishment was being inflicted upon him.

Petitioner's attorney answered, "That is correct." (R. II, 22.)

During the discussion of the sentence which should be imposed the United States attorney said (R. II, 17):

> I might say that he is not a citizen, and of course he will be subject to deportation.

Later he said (R. II, 21):

> In view of the uncertainty of another trial, if the Court please, and the fact that this defendant will be deported after he has served his sentence * * * the Government respectfully recommends that the Court impose a sentence of three years.

No protests as to these statements with respect to deportation were made by petitioner or his attorney.

While petitioner was serving his sentence, deportation proceedings were instituted against him (R. III, 8, 59-60). Petitioner then filed a motion under 28 U.S.C. 2255 seeking to have the sentence vacated on the ground that the prosecution had been barred by the three-year statute of limitations (R. II, 27). The District Court denied the application (R. II, 50-52), and its judgment was affirmed (R. II, 58-66; 203 F. 2d 284). It appears from the opinion of the Court of Appeals that the contention was raised for the first time on appeal that petitioner had not understood all the implications of his plea.

As to the claim that petitioner had not known that his plea would result in deportation, the court said, 203 F. 2d at 286:

> Finally, even though he did not know that his plea would result in deportation, it would not result in "manifest injustice" to hold him to it, if in fact Rozen was not "liberated unharmed", and nowhere in the record before us had Parrino said that he was not. * * * Whether on a new record Parrino can support such a motion is another matter, not now before us.

Petitioner, who had in the meantime almost completed service of his sentence,[3] instituted the instant proceeding under Rule 32(d) for leave to withdraw his plea of guilty (R. III, 11-12). In support of the motion he filed an affidavit stating that his testimony at the first trial was true, that he had acted "only as a guide to the French seaman, Rozen", the victim, and "did not know that he had been kidnapped" (R. III, 13). He also asserted that when his attorney advised him to plead guilty on the retrial, both he and his wife asked whether the plea would be made a ground for a further deportation proceeding and that his attorney advised him that it would not; accordingly, he claimed, he believed by his plea that he was avoiding any possibility of deportation (R. III, 14). Petitioner's wife and his attorney corroborated

[3] Service of the sentence was completed pending the appeal to the court below (R. III, 1).

his statements to the effect that petitioner had asked his attorney about deportation and had been informed that deportation would not ensue from the plea of guilty (R. III, 18, 31). Petitioner asserted that no mention of deportation was made until he appeared before the court for sentencing; that his understanding of English was poor and he "heard only a part and understood less of what was said" by the prosecuting attorney, his own attorney and the court. He said that he had "no chance to inquire further as to the matter of deportation, because, immediately after sentence was imposed and without my having a further opportunity to speak to my attorney or my wife, I was taken from the court house to the Federal Detention Headquarters on West Street, New York, and transferred within twenty-four hours to prison here at Atlanta." (R. III, 15.) The affidavit of his attorney stated that he was present in court when the sentence was imposed, but did not confer and, as he recalled, had no opportunity to confer with petitioner after sentence (R. III, 31-32).

The District Court denied the motion (R. III, 4-10). The court noted, as the Court of Appeals had in its prior opinion (203 F. 2d at 286), that petitioner's first statement that he pleaded guilty on one condition, and subsequent withdrawal of that statement, showed that he was not misled by his limited knowledge of English (R. III, 7). It also noted the statements made by petitioner's counsel and the court, referred to above, showing that it was not disputed that petitioner had been present

at the time the victim was tortured (R. III, 9). The District Court accepted as a fact that petitioner had inquired of his attorney whether the plea to the conspiracy count would enable the Government to deport him and that his attorney had advised him that it would not. The court also found, however, that petitioner "was fully advised of the possibility, if not probability," that deportation proceedings would be brought against him. It held that petitioner should not be permitted to withdraw his plea since upon the record no manifest injustice had resulted. (R. III, 8.)

On appeal (R. III, 3), the Court of Appeals affirmed, Judge Frank dissenting (R. III, 54-69).

ARGUMENT

Rule 32(d) provides that a district court, after sentence has been imposed, "may set aside the judgment of conviction and permit the defendant to withdraw his plea" of guilty if this is necessary "to correct manifest injustice." As the language and purpose of the Rule make clear, a motion for such relief invokes the court's discretion, reviewable only for abuse. *Friedman* v. *United States,* 200 F. 2d 690, 696 (C.A. 8), certiorari denied, 345 U. S. 926; *United States* v. *Schneer,* 194 F. 2d 598, 599-600 (C.A. 3); *Williams* v. *United States,* 192 F. 2d 39, 40 (C.A. 5); *Goo* v. *United States,* 187 F. 2d 62 (C.A. 9). The broadly phrased test of "manifest injustice" necessarily requires a weighing of the particular circumstances of the given case in order to determine whether a defendant's acknowl-

edgment of guilt has been justly accepted and should properly stand as the basis for a sentence already pronounced. In asking that his plea of guilty be withdrawn after the sentence following his conviction on the plea had been almost completely served, petitioner had the burden of showing that such extraordinary relief was necessary "to correct manifest injustice". The District Court held that he had failed to meet this burden, and the Court of Appeals affirmed. We believe that, in the circumstances of this case, further review is not required.

Whether manifest injustice has occurred depends upon an evaluation of all, and not merely some, of the circumstances of the case. No single factor such as that urged here—*i.e.*, petitioner's reliance upon the mistaken advice of counsel that conviction on a plea of guilty would not afford a basis for deportation—is in itself necessarily controlling and dispositive. The weight and effect to be given to any particular circumstance must depend upon its significance in the entire context of the proceeding. Weighing the circumstances here, as the District Court weighed them, we think there is no need to reach the broad issue occupying the bulk of the majority opinion and the whole of the dissenting opinion in the Court of Appeals. It is sufficient that the record as a whole fails to sustain petitioner's claim of "manifest injustice."

In this case, as the District Court found, the record leaves no doubt that the plea of guilty was entered deliberately and knowingly, with the ex-

pectation, which was fulfilled, that the first count of the indictment would be dismissed and a light sentence imposed—contrasting with the 25-year sentence which had followed petitioner's conviction by a jury and which was reasonably to be feared following a retrial. The District Court found, moreover (R. III, 8), that despite his attorney's mistaken advice to the contrary, petitioner "was fully advised of the possibility, if not probability," that deportation proceedings would be filed against him—*i.e.*, that the Government considered this second conviction a basis for deportation.[4] In these circumstances, it seems clear that petitioner was justly convicted, and that withdrawal of his plea of guilty at this time would confer upon him a benefit to which he is not entitled.

The record shows that petitioner voluntarily pleaded guilty to a crime of which he was guilty despite his present protestations of innocence. A jury had convicted him and he had been sentenced to serve twenty-five years. That conviction was reversed only because the jury had failed to find that the kidnapping victim had not been "liberated unharmed," a failure which left open the possibility that the statute of limitations precluded the prosecution. *United States* v. *Parrino,* 180 F. 2d 613 (C.A. 2). Not only did the subsequent plea of guilty formally waive this defense, but petitioner's attorney, at the time of sentencing on the plea, ad-

[4] In addition to the conviction for the offense involved here, petitioner had been sentenced in 1940 to imprisonment for six months for possession and operation of an unregistered still.

mitted facts showing that the victim was not "liberated unharmed" and that the statute of limitations was therefore unavailable to petitioner. Pp. 6-7, *supra*. As the majority below observed (R. III, 58-59), "utterly no grounds appear in the record to support a contention that the waiver here was other than deliberate and intentional." Nor is there any claim that when he admitted the facts showing the propriety of this waiver (*i. e.*, showing that the prosecution was not barred by limitations), petitioner's attorney was misrepresenting him by making a mistaken and unauthorized concession.

In affirming a denial of petitioner's earlier effort to vacate his conviction by a motion under 28 U.S.C. 2255, Judge Learned Hand wrote for the court below (*United States* v. *Parrino*, 203 F. 2d 284, 286) that "even though he did not know that his plea would result in deportation, it would not result in 'manifest injustice' to hold him to it, if in fact [the victim of the kidnapping] was not 'liberated unharmed,' and nowhere in the record before us had Parrino said that he was not." While he now asserts his innocence—apparently including, though not specifying or specifically relying upon, the assertion that the victim was liberated unharmed—petitioner fails to meet the refutation of his claim of manifest injustice stated by Judge Hand's opinion on the prior motion. For the belated assertion of innocence pressed now in no way warrants erasing from view the deliberate admission, when petitioner was sentenced on his guilty plea, that the victim had been harmed. While Judge Hand inti-

mated that such an assertion might make a differnece, he had no occasion at the time to check back and weigh against it the contrary admission in open court at the time of sentencing. [5]

Apart from the expectable and (at this late date) weightless assertion that he was innocent after all, petitioner urges as the ground for nullifying his conviction and sentence on a plea of guilty that there was "manifest injustice" because he was erroneously advised by his attorney that such a plea would not furnish a basis for deportation. Apparently suggesting that his actual guilt or innocence was a matter of no concern, he contends (Pet. 2) that this incorrect advice "was the one

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[5] Judge Frank's dissent notes (R. III, 60, fn. 5) that petitioner in the present proceeding swore that his testimony at the original trial, which included the assertion that the victim of the kidnapping had not been harmed, was true. The dissent then declares that this sworn statement must be accepted as true for present purposes, leaving only the question "whether defendant was misled into the belief that his plea would not result in deportation." (R. III, 60.) We respectfully disagree. The district judge, to whose discretion the instant motion was initially addressed, stressed as a "significant admission" the acknowledgment by petitioner's attorney, in petitioner's presence, that the victim of the kidnapping had been harmed (R. III, 9). The majority below found nothing to show that the waiver of the statute of limitations, which turned on whether the victim had been harmed, had not been "deliberate and intentional." The waiver and admission are not set at naught merely by petitioner's tardy effort to retract them. On the contrary, because they occurred and because there is no showing that their occurrence resulted from deception or mistake or bad advice, they testify still to petitioner's guilt and against his claim that his plea of guilty should now be eliminated to avoid "manifest injustice."

reason and the determining consideration upon which he entered his plea." The courts below accepted as true the assertion that the mistaken advice had been given, and the Court of Appeals assumed that petitioner had acted in reliance upon it (R. III, 56). However, the District Court found, significantly, that petitioner "was fully advised of the possibility, if not probability, that * * * [new deportation proceedings] would be filed" (R. III, 8). It is difficult to reconcile the importance petitioner's motion now attaches to his attorney's erroneous opinion with the complete lack of protest by either petitioner or the attorney when the United States Attorney at the time of sentencing twice said that petitioner would be deported after serving his sentence. It is clear, in any event, that the Government had no part, directly or indirectly, in causing any misunderstanding which petitioner may have had; on the contrary the statements of Government counsel were fair warning against it.

In short, nothing in petitioner's motion detracts from the critical assurance the record carries that he deliberately and knowingly pleaded guilty to a charge of a crime he had actually committed. We do not contend that mistaken advice of counsel of the kind asserted here could in no circumstances be made the basis of a claim of manifest injustice justifying withdrawal of a plea of guilty. It is sufficient that on the facts of the present record the claim was properly rejected by the District Court,

and that the affirmance by the court below was correct.[6]

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

SIMON E. SOBELOFF,
Solicitor General.
WARREN OLNEY III,
Assistant Attorney General.
BEATRICE ROSENBERG,
Attorney.

SEPTEMBER 1954.

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[6] It is not without significance in appraising the merits of petitioner's tardy motion that retrial of this case would at this time be extremely difficult, if not impossible. The case was already old when petitioner pleaded guilty, and it is now three years older. (In connection with the lapse of time, it should be noted that the reason for the long delay in the first trial was petitioner's own act in fleeing from justice and remaining in hiding for six years after the crime was committed.) The victim of the kidnapping was a French sailor who had to be released from his employment by the French Line and brought to the United States for the purpose of testifying. This was done, not only on the first trial, but in preparation for the second before petitioner pleaded guilty. The Government does not know at this time whether he is still available, but it would manifestly be a hardship upon him, as well as an expense to the Government, to bring him back for a third time. One of the witnesses against petitioner at the first trial was a principal defendant on the original charge, Salvatore Mancuso, who was subsequently deported to Italy. He was brought back from Italy in anticipation of the second trial before petitioner pleaded guilty, but he disappeared before trial and has not since been found. All these facts seem to us to have bearing on the question of whether the misadvice by petitioner's own counsel, in which the Government had no part, can be deemed to have resulted in such manifest injustice as would warrant setting aside petitioner's deliberate and knowing plea of guilty.

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